No. 983

# In the Supreme Court of the United States

October Term, 1944

National Memorial Park [illegible]

Commissioner [illegible]

On petition for [illegible]
States [illegible]
Circuit [illegible]

[illegible]

## INDEX



## CITATIONS





632845—45——1

# In the Supreme Court of the United States

OCTOBER TERM, 1944

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No. 933

NATIONAL MEMORIAL PARK, INC., PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the Tax Court (R. 23–54) is not reported. The opinion of the Circuit Court of Appeals (R. 64–77) is reported in 145 F. 2d 1008.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 13, 1944 (R. 77). The petition for a writ of certiorari was filed on February 9, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

1. Whether twenty percent of taxpayer's annual cash collections from purchasers of cemetery lots may be excluded from its gross income on the theory that such an amount was set aside in trust in the form of an "improvement fund".

2. Whether the taxpayer may avail itself of the installment sales provisions of Section 44 of the Revenue Acts of 1934 and 1936, in cases in which the initial payments on the cemetery lots exceed thirty per cent of the selling price. This question turns upon whether the interests sold by taxpayer were personalty or realty.

## STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are printed in the Appendix, *infra,* pp. 12–18.

## STATEMENT

The pertinent facts as found by the Tax Court (R. 23–36) may be summarized as follows:

Petitioner was organized as a Delaware corporation in 1933 and during the years here involved operated a cemetery in Fairfax County, Virginia. In 1933 it acquired 92.986 acres of land, of which the suitable area was plotted into 24,429 salable four-grave cemetery lots. On June 22, 1934, pursuant to a resolution of the board of directors, taxpayer entered into a "trustee and depositors' agreement" with the City National Bank of Philadelphia. (R. 24.) This agreement provides, *inter*

*alia,* that no lots are to be sold in the cemetery unless at least twenty per cent of the purchase price is paid at the time of sale. This twenty percent is to be deposited with the bank and credited to a General Fund. Subsequent payments by the purchaser of a lot are to be credited to the General Fund until one-half of the purchase price is paid. Thereafter, the payments are to be apportioned as follows (R. 25):

| | |
|---|---|
| (a) Perpetual Maintenance Fund | 20% |
| (b) Improvement Fund | 40% |
| (c) General Fund | 40% |

When payment is made in full the purchaser's account is to reflect the following allocation of the total purchase price (R. 25):

| | |
|---|---|
| (a) Perpetual Maintenance Fund | 10% |
| (b) Improvement Fund | 20% |
| (c) General Fund | 70% |

Ten per cent of the gross proceeds is to be set aside as a Perpetual Maintenance Fund, the principal to be invested by the bank in accordance with Pennsylvania laws governing trustee investments and the net income to be paid to taxpayer; taxpayer "covenants and agrees" to use the income so received for perpetual care and maintenance of the grounds (R. 26). Twenty per cent of the total selling price is to be set aside as an Improvement Fund. This fund is to be expended for "the purpose of developing, enlarging, improving and beautifying the Memorial Park" (R. 26). Payments by the bank from the Improvement Fund are to be made upon presentation of proper

certificates of expenditures approved by taxpayer. If money is spent in acquiring title to real estate, the bank is required to reimburse the taxpayer upon presentation of "cancelled checks or other evidence", together with a copy of the resolution of taxpayer's board of directors. (R. 27.) Moneys which are not required to be set aside for the Perpetual Maintenance Fund or Improvement Fund are to be credited to the General Fund. This fund is subject to disposition by taxpayer without supervision or control of the bank. (R. 28.) The bank is under no duty or obligation to see that the moneys paid by it to taxpayer are applied in accordance with the terms of the agreement (R. 28).

During the years here involved, the sales contracts used by petitioner provided, *inter alia,* as follows (R. 29–30):

> The said party of the first part agrees to and with the said party of the second part that when payment in full has been made * * * in accordance with the provisions hereof, that good and sufficient deed to the said allotted section * * * conveying all rights therein * * * will be delivered subject, however, to the rules, regulations and provisions now or hereafter made governing the conduct of the said National Memorial Park.
>
> The said party of the first part agrees to set aside and build up a fund for the improvement and beautification of the en-

> tire Park * * * and in addition thereto create a maintenance fund for the perpetual care and upkeep of the said Park.

When the down payment was twenty percent or more of the sales price, taxpayer deposited the money in the Hamilton National Bank for the account of City National Bank. A so-called "collection advice" was then prepared by petitioner in which the amounts received from each customer during a particular day and the allocation of such amounts to the various funds in accordance with the agreement were set forth. The collection advice was then forwarded to the City National Bank. All collections were allocated to the General Fund until fifty percent of the total installment payments had been made by the customer. (R. 30–31.)

When customers paid less than twenty percent of the purchase price, the collections from such sales were not forwarded to the City National Bank and the money was retained by petitioner until further payments were made (R. 31).

When the last payment due from the purchaser was made, indentures were executed by the Bank or its nominee (R. 29, 31). These provided, *inter alia,* that (R. 31–32):

> the said Grantor * * * does grant * * * unto the said Grantee his heirs and assigns, subject to the conditions and restrictions hereinafter set forth, the right of sepulture and the right to the exclusive

use, occupation and possession for that purpose only in the lot of ground in the said National Memorial Park.

The said Grantor * * * hereby covenants to and with the said party of the second part, his heirs and assigns, that of the purchase price of all cemetery lots in this said Park there will be set aside thirty (30%) percent, of which funds the City National Bank of Philadelphia shall be trustee; one-third of this said fund shall be capitalized and held intact and the income therefrom shall be used solely and perpetually for the purpose of maintenance and preservation of the said Memorial Park and for the proper upkeep thereof and the other two-thirds thereof shall be used to erect buildings and make improvements.

During the years 1935, 1936, and 1937, taxpayer remitted the following amounts to the City National Bank (R. 33):

| | |
|---|---|
| 1935 | $140, 525. 75 |
| 1936 | 365, 543. 00 |
| 1937 | 301, 698. 39 |

The amounts of the improvement certificates certified by taxpayer and the amounts paid thereon by the Bank are as follows (R. 33):

| | *Improvement certificates* | *Amounts paid* |
|---|---|---|
| 1935 | $31, 625. 05 | $13, 794. 82 |
| 1936 | 46, 603. 15 | 57, 761. 85 |
| 1937 | 52, 425. 69 | 51, 887. 52 |

During the same period, taxpayer spent the following amounts for improvements (R. 33):

| | |
|---|---|
| 1935 | $79, 699. 83 |
| 1936 | 39, 582. 57 |
| 1937 | 47, 234. 85 |

The following amounts were set up by taxpayer in an account captioned "Reserve for Improvements" (R. 35):

| | |
|---|---|
| 1934 | $5, 203. 65 |
| 1935 | 108, 248. 42 |
| 1936 | 56, 513. 36 |
| 1937 | 65, 649. 06 |
| 1938 | 17, 554. 13 |

In filing its returns for the taxable years, taxpayer reported its income as derived from the sale of personal property on the installment basis. In computing its gross income it excluded 30.64 per cent of its cash collections for the year on the basis of the following calculations: Maintenance Fund—10 per cent, Improvement Fund—20 per cent, and land cost—0.64 per cent. (R. 35.)

The Commissioner determined that "the installment basis for reporting profit from lot sales is not permissible since the method of reporting does not conform to the requirements of section 44 (b) of the Revenue Acts of 1934, 1936, and 1938, and Articles 44–2 and 44–3 of Regulations 86, 94 and 101" (R. 35). He computed taxpayer's net taxable income on the basis of net profit realized from the lot sales in each of the taxable years. In computing the cost basis of each year's sales, the Commissioner added the cost of land improvements to the original cost by way of a proportionate allocation. (R. 35–36.) The ten per cent of sales receipts paid into the

Perpetual Maintenance Fund was excluded from gross income (R. 36).

The Tax Court sustained the Commissioner except that it permitted the taxpayer to use the installment sales provisions of Section 44 (b) which apply to sales in which the initial payment from a customer is less than thirty per cent of the contract price (R. 36–55). On appeal, the Circuit Court of Appeals affirmed (R. 64–77).

**ARGUMENT**

1. Apart from the issue as to the applicability of Section 44 (a) to taxpayer's sales (*infra*, p. 11, point 3), the questions of law which taxpayer seeks to have this Court decide and as to which it asserts that there is a conflict of decisions are not raised on this record. As the Tax Court noted (R. 38–39), "petitioner has not offered any evidence to show what amount of the sum excluded from gross income in each year was allocated by the bank and credited to either the General Fund or the Improvement Fund under the 1934 agreement". The Tax Court found that "all collections were allocated to the general fund until 50 per cent of the total installment payments had been made by the customer" (R. 31), but pointed out (R. 38) that "there has been no break-down by petitioner for any one of the taxable years to show what amounts received in the taxable years represent payments on account of the first half of the purchase price, and payments on account

of the second half of the purchase price". Indeed, since taxpayer began to do business only two years before the taxable years here involved, it is reasonable to assume that a substantial portion of taxpayer's receipts were on account of new contracts and so largely allocable, as payments of the first fifty per cent, to the General Fund (R. 38).

2. In any event, the Improvement Fund had a heterogeneous character which excluded it on several counts from a "trust fund" classification: (1) The "trustee" bank was responsible neither to purchaser (R. 73) nor to taxpayer (R. 67) as to the final application of the moneys disbursed from the Improvement Fund; (2) the use of the money was controlled by taxpayer; (3) there was no essential relationship in the taxable years between the amounts paid by the bank to taxpayer against improvement certificates and the total amount paid by taxpayer to the bank; and (4) the taxpayer was privileged to use the Improvement Fund to enlarge the cemetery as well as to develop and beautify it. As the court below so aptly put it (R. 73):

> In the instant case the improvement fund, denuded by the impact of surrounding facts, proves to be nothing more than a conduit, channelling the money from the purchaser to the beneficial use of the petitioner. * * *

Practically none of the *indicia* of a trust, except perhaps the label, exists in this instance. The

Tax Court and the Circuit Court of Appeals were plainly correct in concluding that the Improvement Fund was not impressed with a trust.[1]

The taxpayer asserts that the decision below is in conflict with *Portland Cremation Ass'n* v. *Commissioner,* 31 F. 2d 843 (C. C. A. 9th) (Br. 16). But the fund there involved was a permanent maintenance fund, similar to taxpayer's Permanent Maintenance Fund (see note 1, p. 10), not its Improvement Fund, and the purchasers of the niches and vaults possessed (p. 846) "the right, to protect themselves and demand the preservation of the fund." In the instant case taxpayer's agreement with the bank provided (R. 28):

> * * * The trustees shall be under no duty or obligation to see to the application of any of the moneys paid by it under the terms of this agreement to the Memorial Park, in the manner herein provided.

Such remedy as the purchaser may have is of a contractual nature based upon the purchaser's agreement with the taxpayer (*supra,* pp. 4–6). But the equitable right of a beneficiary against the trustee which the court found available in the *Portland Cremation* case, where the cemetery itself

[1] The Commissioner conceded taxpayer's right to exclude ten percent of the annual cash receipts from gross income for the Perpetual Maintenance Fund, the principal of which was to be "held intact by the trustee and shall be invested" and the net income of which was to be used by taxpayer for the perpetual care and preservation of the grounds (R. 36).

was the trustee, is not available to the purchaser in the instant case.

3. Whether state or federal law controls the application of Section 44 (Appendix, *infra*, pp. 12–13), taxpayer was engaged in the sale of realty. The Virginia Supreme Court of Appeals has settled the nature of interests like those sold by taxpayer in *Goldman* v. *Mollen*, 168 Va. 345, 355, in which it designated the cemetery lot-holder's right as one "in the nature of a permanent easement." Moreover, the Commissioner has long taken the position that the term "real property" as used in Section 44 (b) includes rights in land as well as the land itself (R. 76–77). Accordingly, the sale of the "easement" was correctly held by the court below to come within the ambit of Section 44 (b).

## CONCLUSION

The decision of the court below is correct and there is no conflict. The petition should be denied.

Respectfully submitted.

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